that has changed the use from an actionable wrong to a justifiable act. Although this interpretation of the statute by the Supreme Court was applied where the defendant was a government officer,[20] and not an independent contractor, the distinction, as suggested by the court in the principal case, is without substance, as the license to make the article covers a making by an independent contractor.[21]

ESTOPPEL BY NEGLIGENCE.—Perhaps no single branch of the law of estoppel is as perplexing as so called "estoppel by negligence".[1] Relegated to its proper category this particular sub-division seems to be merely a variety of the more comprehensive species "estoppel by misrepresentation", provided the term misrepresentation be understood to include not merely misrepresentations made by the estoppel-denier in person, but in addition assisted misrepresentations, in which the subsequent change of position on the part of the estoppel-asserter is due partially to the conduct of an intermediary.[2] The gist of the estoppel is carelessness.[3] After considerable discussion in the English courts a rule for determining under what circumstances a person should be estopped because of his careless behavior was formulated by Justice Blackburn,[4] and this rule has since been adopted in several American jurisdictions.[5] To raise an estoppel under this rule there is required the presence of three elements: (1) a neglect of some duty owed, to the person misled or to the public in general, obviously, the concomitant of the failure to use due care which must be shown to render a defendant liable in an action for negligence; (2) the neglect must be in the transaction itself; (3) the neglect must be the proximate cause of the estoppel-asserter's change of position.

At first glance this rule appears to be simple and substantially just. Examination of the cases decided under it, however, discloses how rigorously its sections have been construed against estoppel-asserters until "estoppel by negligence", as a practical matter, has been virtually adjudicated out of existence by illiberal application, of the very rules framed to meet situations where want of care on the part of an estoppel-

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[20]Crozier *v.* Krupp, *supra.*

[21]Foster Hose Supporter Co. *v.* T. P. Taylor Co. (C. C. A. 1912) 191 Fed. 1003.

[1]It may be said that there is often a tendency, due to lapses of close thinking, to obtrude estoppel where it does not belong, merely because the result obtained by following the rules of a different branch of law happens to be identical. See Bigelow, Estoppel (6th ed.) 493, 612-613; Marston *v.* Allen (1841) 8 M. & W. *494, *504; *cf.* N. Y. & N. H. R. R. *v.* Schuyler (1885) 34 N. Y. 30. See also in this connection Ewart, Estoppel by Misrepresentation, 104, (2), discussing Goodtitle *v.* Morgan (1787) 1 T. R. *755, *762; Layard *v.* Maud (1867) L. R. 4 Eq. *397 and Lloyd *v.* Jones (1885) 29 Ch. D. 221; and p. 107, (7), discussing Brown *v.* Read (1875) 79 Pa. 370 and Pennsylvania R. R. Co.'s Appeal (1878) 86 Pa. 80.

[2]Ewart, Estoppel by Misrepresentation, 100-102. Greene *v.* Smith (1884) 57 Vt. 268; Van Duzer *v.* Howe (1860) 21 N. Y. 531.

[3]Ewart, Estoppel by Misrepresentation, 98-100.

[4]Swan *v.* No. B. A. Co. (1863) 2 H. & C. *175, *181.

[5]Knox *v.* Eden Musee (1896) 148 N. Y. 441, 462; Brown etc. Co. *v.* Howard Fire Ins. Co. (1875) 42 Md. 384; O'Herron *v.* Gray (1897) 168 Mass. 573.

denier was in some measure responsible for a disastrous change of position by another.[6] For example, whenever it becomes necessary to determine whether due care has been shown by the estoppel-denier to the person misled or to decide what was ordinary care under the particular circumstances the courts seem inclined to favor the party against whom the estoppel is urged.[7] Furthermore, the prerequisite that "the neglect must be in the transaction itself", narrow as it is from its very wording, has been circumscribed still further in its application, until it seems to mean that the carelessness must take place in the act immediately preceding a change of position by the estoppel-asserter.[8] Since in cases of assisted misrepresentation the final act of a course of dealing is almost invariably performed by an intermediary it is next to impossible to apply the second prerequisite, as it is generally interpreted, without preventing altogether the successful invocation of estoppel.[9] And finally, the requirement that the carelessness of the estoppel-denier must be the proximate cause of the misled person's undoing is employed continually to wreck tentative estoppels.[10] This prerequisite, already discredited by some judges,[11] seems from its nature to be as infinitely fatal to successful estoppels as the last.[12]

It is not surprising, therefore, that few estoppels by negligence are raised in jurisdictions adopting Justice Blackburn's rule. In a recent New York case, *People's Trust Co.* v. *Smith* (1915) 215 N. Y. 488, the customary result was reached. A mortgagee deposited for safe keeping with his nephew, who bore the uncle's indentical name, his mortgage and its bond, unaccompanied by any blank form of

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[6]See Cababe, Estoppel, 100-102.

[7]See Hall *v.* West End Co. (1883) Cab. & E. 161, 166; Robb *v.* Pennsylvania Co. (1898) 186 Pa. St. 456; Societe Generale *v.* Metropolitan Bank (1873) 27 L. T. R. N. S. 849, 856; Scholfield *v.* Earl of Londesborough [1896] A. C. 514, 544; Knox *v.* Eden Musee, *supra.* But see Coventry Sheppard & Co. *v.* Great Eastern Ry. (1883) 11 Q. B. D. 776, 782; Seton *v.* Lafone (1887) 19 Q. B. D. 68, 72.

[8]Arnold *v.* Cheque Bank (1876) 1 C. P. D. 578, 588; Merchants of the Staple *v.* Bank (1887) 21 Q. B. D. 160, 172; Saderquist *v.* Ontario Bank (1889) 15 Ont. App. 609, 615; O'Herron *v.* Gray, *supra*; Knox *v.* Eden Musee, *supra*; Vagliano *v.* Bank (1888) 22 Q. B. D. 103, 127; but see s. c. [1891] A. C. 107, 116; Seton *v.* Lafone, *supra.*

[9]Ewart, Estoppel by Misrepresentation, 112-119. The author advances an interesting theory as to the development of the second prerequisite from a misinterpretation of the rule announced in Bank of Ireland *v.* Evans Charities (1855) 5 H. L. Cas. *389.

[10]See Carr *v.* London etc. Ry. (1875) L. R. 10 C. P. 307; Cababe, Estoppel, 143-146 (discussing the proximate cause in Seton *v.* Lafone, *supra,* and Coventry *v.* R. R. Co., *supra,* where estoppels were granted). Whenever a crime by an intermediary intervenes between the carelessness of the estoppel-denier and the change of position by the person misled the courts almost unanimously declare the crime to be the proximate cause and refuse to raise an estoppel. Baxendale *v.* Bennett (1878) 3 Q. B. D. 525; Merchants of the Staple *v.* Bank, *supra*; Arnold *v.* Cheque Bank, *supra*; Robb *v.* Pennsylvania Co., *supra*; Brown etc. Co. *v.* Howard Fire Ins. Co., *supra*; O'Herron *v.* Gray, *supra*; Knox *v.* Eden Musee, *supra.* But *cf.* Van Duzer *v.* Howe, *supra,* decided before Blackburn, J., laid down his rule and not discussing proximate cause.

[11]See remarks of Lord Esher and Lopes, J., in Seton *v.* Lafone, *supra.*

[12]Ewart, Estoppel by Misrepresentation, 119-121.

assignment or other indicia of transfer whatsoever. The nephew executed in his own handwriting an instrument purporting to be an assignment of the documents and by delivery of the several instruments to the plaintiff obtained from him a loan. The Court of Appeals refused unanimously to hold that the uncle was estopped to assert his ownership. The decision was based primarily upon the ground that the mortgagee owed to the plaintiff no duty to exclude all possibility of crime by the custodian he had selected. It seems unfortunate, however, that the court confined itself merely to the question of the duty owed. Had the judges considered as well the second and third prerequisites of Justice Blackburn's rule the self-contradictions in these requirements would undoubtedly have been brought to their attention and an opportunity would have been offered to render the rule really useful by eliminating the second prerequisite altogether and by modifying the third so as to demand only a change of position merely "reasonably consequent upon the carelessness".[13]

Accepting for the moment the modifications suggested just above and assuming that the requisite duty existed in the principal case, the question remains whether the facts in that case show that the change of position was sufficiently connected with the carelessness of the estoppel-denier to warrant a decision in favor of the plaintiff. The unanimity of the court augurs that even in such altered circumstances the defendant would not have been estopped. Nevertheless, by selecting for custodian a person bearing his own name and by depositing with this person instruments bearing on their faces indications that they belonged to the depositary in his own right, the defendant seems to have contributed largely to the deceit practiced upon the plaintiff and it seems only just that the disastrous consequences should be visited upon him who rendered the victimization possible, even if his carelessness happened to be slight, rather than upon a person utterly innocent of any carelessness at all.[14]

EVIDENCE OF THREATS BY DECEASED AGAINST DEFENDANT IN SUPPORT OF THE PLEA OF SELF-DEFENCE.—In support of a plea of self-defence in a prosecution for homicide, the defendant often wishes to introduce evidence of threats against him made by the deceased prior to the fatal conflict, in order to show the *animus* of the deceased or the defendant's extremity and fear. Such evidence is admissible only when the killing has been admitted, and for the purpose of establishing justification therefor.[1] If the threats had not been communicated to the accused before the killing, they may be used to show a design of the deceased to take his life or to do him grievous bodily injury. Proof of such a design gives rise to an inference that the deceased attempted to carry it into execution

[13]Ewart, Estoppel by Misrepresentation, 121-122.

[14]Such indeed appears to be the tendency of two earlier New York cases. Van Duzer *v.* Howe, *supra*, and McNeil *v.* Tenth Nat. Bank (1871) 46 N. Y. 325, 333.

[1]Siebert *v.* People (1892) 143 Ill. 571, 590; see 1 Wigmore, Evidence, § 111 (2). It is to be noted that neither the character of the deceased nor his threats against the defendant can, of themselves, in any manner serve to justify the killing. Their function is to show that the deceased was the probable aggressor, and hence that the defendant's self-defence was justifiable. People *v.* Arnold (1860) 15 Cal. *476; *cf.* Chase *v.* State (1872) 46 Miss. 683, 703; but see People *v.* Taylor (1904) 177 N. Y. 237.